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The Emotional Trauma of Hijacking: Who Pays?

INTRODUCTION

The issue of recovery for negligently inflicted mental distress has long been debated.¹ Objections to recovery include the difficulty of proving and measuring damages and the potential for vexatious and fictitious claims.² Nevertheless, the trend in recent years has been to permit recovery for mental distress alone.³ The

¹ See, e.g., Abramovsky, *Compensation for Passengers of Hijacked Aircraft*, 21 BUFF. L. REV. 339, 348-49 (1971-72).

Traditionally, the common law did not recognize a separate cause of action for negligently inflicted mental distress. . . . The first breakthrough in permitting recovery . . . occurred when the courts permitted recovery where the defendant's negligent acts caused physical injuries to the plaintiff which were accompanied by mental distress. . . . For many years the courts restricted recovery . . . to cases where "impact" occurred. . . . In recent times, the impact doctrine has been abandoned by most jurisdictions.

Id. See generally R. KEETON, PROSSER AND KEETON ON TORTS § 12 (5th ed. 1984) ("the law has been slow to accept the interest in peace of mind as entitled to independent legal protection") [hereinafter cited as PROSSER].

² See PROSSER, *supra* note 1, at § 12; Abramovsky, *supra* note 1, at 348.

³ See Abramovsky, *supra* note 1, at 349 (citing *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961)). See also *Bass v. Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (independent cause of action exists when mental distress is "medically diagnosable" and of "sufficient severity so as to be medically significant"); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109, 110-13 (Ohio 1983) ("Emotional injury can be as severe and debilitating as physical harm and is deserving of redress. . . . [A] cause of action may be stated for the negligent infliction of serious emotional distress without a contemporaneous physical injury."); *Chapetta v. Bowman Transp., Inc.*, 415 So. 2d 1019, 1022 (La. App. 1982) (recovery permitted for mental distress arising from vehicular accident, although plaintiff was not physically injured); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1069-71 (Hawaii 1981) (damages for mental distress to family members for negligently inflicted death of family dog); *Molien v. Kaiser Found. Hospitals*, 616 P.2d 813, 815-21 (Cal. 1980) (cause of action existed for mental distress arising from negligent medical examination and diagnosis); *Montinieri v. Southern New Eng. Tel. Co.*, 398 A.2d 1180, 1182-84 (Conn. 1978) ("[R]ecovery for unintentionally-caused emotional distress does not depend on proof of either an ensuing physical injury or a risk of harm from physical impact.").

issue has arisen over the last decade in the context of the Warsaw Convention⁴—may an airline passenger who is subjected to the terror of a hijacking, and whose only injury therefrom is typically mental distress, recover under the Convention?⁵ The answer to this question is uncertain at best.

This Note examines four cases that have decided the issue and reached conflicting results. A legal and historical background is presented initially to familiarize the reader with air carrier liability vis-a-vis the Warsaw Convention.

I. CARRIER LIABILITY—ORDINARY TORT PRINCIPLES

The liability of air carriers for injuries to passengers on international flights is governed exclusively by the Warsaw Convention.⁶ In the absence of a statutory rule to the contrary, carrier liability for injuries incurred on domestic flights is governed by the ordinary rules of negligence.⁷ Accordingly, an injured plaintiff must establish the carrier's duty of care toward him and a breach of that duty, and that the breach was the proximate cause of the plaintiff's identifiable injuries.⁸ Further, the plaintiff must prove himself free of contributory negligence in jurisdictions following that doctrine.⁹

An airline is a common carrier and thus is required to exercise a high degree of care for the safety of its passengers.¹⁰ While it has long been held that an airline is not an insurer of its passengers' safety,¹¹ it is nevertheless held to a very high, or

⁴ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934) [hereinafter referred to and cited as Warsaw Convention].

⁵ See notes 76-77 *infra* and accompanying text.

⁶ See notes 21-177 *infra* and accompanying text.

⁷ See 8 AM. JUR. 2d *Aviation* § 88 (1980); Annot., 72 A.L.R. 3d 1299, 1301-02 (1976). For a discussion of carrier liability arising from hijackings of domestic flights, see Comment, *Liability of Air Carriers for Injuries to Passengers Resulting From Domestic Hijackings and Related Incidents*, 46 J. AIR L. & COM. 147 (1981).

⁸ See Abramovsky, *supra* note 1, at 343.

⁹ See *id.*

¹⁰ See PROSSER, *supra* note 1, at § 34; Abramovsky, *supra* note 1, at 343.

¹¹ See *Connolly v. Philadelphia Transp. Co.*, 216 A.2d 60, 62 (Pa. 1966); *Shamblee v. Virginia Transit Co.*, 132 S.E.2d 712, 714 (Va. 1963); *Quigley v. Wilson Line of Mass., Inc.*, 154 N.E.2d 77, 79 (Mass. 1958).

the highest, standard of care.¹² However, this duty does not include the responsibility of protecting against events that are not reasonably foreseeable.¹³ Arguably, hijackings are reasonably foreseeable events;¹⁴ therefore, airline carriers must exercise the highest duty of care to prevent hijackings. A breach of that duty could be established by proving the carrier's failure to provide or negligent use of mechanical screening devices.¹⁵ A breach of this nature would not be superseded by the hijacker's intervening criminal act, and would establish the requisite proximate causation.¹⁶

Proof of an identifiable injury-in-fact is the final element of a hijacking victim's *prima facie* case. While it is clear that damages for actual bodily injuries can be recovered, there is some question concerning recovery for damages resulting solely from mental distress.¹⁷ This is a particularly significant issue to most hijacking victims, whose only injuries result from mental distress and consist of mental anguish caused by the hijacking.¹⁸ Although negligence actions for mental distress alone were not recognized historically,¹⁹ many jurisdictions today permit recov-

¹² See *Mobile Cab & Baggage Co. v. Busby*, 169 So. 2d 314, 316-17 (Al. 1964); *North v. Williams*, 366 P.2d 406, 408 (Okla. 1961); *Collier v. Citizens Coach Co.*, 330 S.W.2d 74, 76-77 (Ark. 1959); *Angelo v. Pittsburg Rys.*, 151 A.2d 867, 869 (Pa. Super. Ct. 1959).

¹³ See Annot., *supra* note 7, at 1301.

¹⁴ See *Abramovsky*, *supra* note 1, at 345-47 ("[R]ecurrent hijacking attacks strongly suggest the imminence of others. . .").

¹⁵ Mr. Abramovsky argues that "it has long been held that an airline's failure to equip its aircraft with adequate safety devices constitutes actionable negligence . . . the underlying rationale can logically be extended to safety devices located at the boarding gate." *Id.* at 346.

¹⁶ See *id.*

¹⁷ See *id.* at 347-48.

¹⁸ See *id.* at 348.

¹⁹

Traditionally, the common law did not recognize a separate cause of action for negligently inflicted mental distress. The attitude of the common law was succinctly stated by Lord Wensleydale when he stated [in *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (Ex. 1861)]: "[m]ental pain or anxiety the law cannot value, and does not pretend to redress when the unlawful act . . . causes that alone. . . ." Several arguments have been offered to support this rationale. They [include] that it is difficult to prove . . . that even if proved it would be difficult to assess the monetary damages . . . that . . . many spurious actions would be commenced.

Id.

ery for mental anguish where there is "no doubt as to the presence and extent of the damage and the fact that it was proximately caused by [the] defendant's negligence."²⁰

II. CARRIER LIABILITY—THE WARSAW CONVENTION

On October 12, 1929, the Convention for the Unification of Certain Rules Relating to International Transportation by Air was completed and opened for signature in Warsaw, Poland.²¹ The Convention was intended to provide legal certainty to the world's developing airline industry.²² This international treaty has become commonly known as the Warsaw Convention.²³ The Convention resulted from the expressed concerns of investors and insurance companies over the uncertainty of the law covering international flights.²⁴ The potential for unlimited liability for a single accident was prohibitive;²⁵ variations in litigation rules and practices among countries contributed to the uncertainty.²⁶ The Convention established an "international code for declaring the rights and liabilities of the parties to contracts of international carriage by air."²⁷ The United States accepted the Convention

²⁰ *Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961). See cases cited *supra* note 3.

²¹ See 8 AM. JUR. 2d *Aviation* § 113 (1980). "The Warsaw Convention was the result of two international conferences held in Paris in 1925 and Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aériens (CITEJA) created by the Paris Conference." Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1966-67). The official text of the Convention is in French. Any citations contained herein will use the English translation provided at Warsaw Convention, 49 Stat. 3014-23 (1934).

²² The prologue to the Convention indicates that the parties thereto drafted the agreement in recognition of "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier. . . ." 49 Stat. at 3014. See also Note, *Up in the Air Without a Ticket: Interpretation and Revision of the Warsaw Convention*, 6 FORDHAM INT'L L.J. 332, 334 (1982-83) ("The essential purpose of the Convention was to provide the world's fledgling airline industry with a 'legal basis' for its operation.").

²³ See Abramovsky, *supra* note 1, at 350.

²⁴ See Minutes, Second International Conference on Private Air Law, Oct. 4-12, 1929, Warsaw 20-23 (R. Horner & D. Legrez ed. 1975) [hereinafter cited as Minutes]. See also Note, *supra* note 22, at 335 n.16.

²⁵ See Lowenfeld & Mendelsohn, *supra* note 21, at 499-500.

²⁶ See *id.* at 498-99.

²⁷ Note, *supra* note 22, at 335 (quoting *Grein v. Imperial Airways* [1937] 1 K.B. 50, 75 (C.A. 1936)).

by presidential proclamation on October 29, 1934,²⁸ upon the express condition that the Convention was not to apply to international transport performed by the United States government.²⁹

The Convention eliminated the prior uncertainty and enabled airline companies to obtain private investors and insurance coverage by exchanging a presumption of carrier liability as a *quid pro quo* for limited passenger recovery.³⁰ Article 17 of the treaty provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.³¹

Once it has been proven that the accident resulting in injury or death occurred either on the airplane or while the passenger was embarking or disembarking, the burden shifts to the airline to prove that it took "all necessary measures" to avoid the accident,³² or that the passenger was contributorily negligent.³³ Thus, the carrier's liability is not absolute under the Convention, but

²⁸ See 49 Stat. 3000. The Convention was completed and opened for signature on October 12, 1929. It became effective on February 13, 1933; however, under article 38(1) it remained open for adherence by any state. The United States accepted the Convention by depositing its "instrument of adherence . . . in the archives of the Ministry for Foreign Affairs of Poland on July 31, 1934," making its adherence effective 90 days thereafter pursuant to the provisions of article 38(2) and (3). See *id.* at 3013. The presidential proclamation declared publicly the United States adherence to the Convention as of October 29, 1934, providing that "every article and clause [of the Convention] may be observed and fulfilled with good faith by the United States of America and the citizens thereof. . . ." *Id.*

²⁹ The presidential proclamation accepting the Convention conditioned the United States adherence upon "the reservation . . . that the first paragraph of Article 2 of the Convention shall not apply to international transportation that may be performed by the United States of America or any territory or possession under its jurisdiction." *Id.* at 3013.

³⁰ See Note, *supra* note 22, at 335 n.20 (citing Minutes, *supra* note 24, at 37-39).

³¹ Warsaw Convention, *supra* note 4, at art. 17.

³² See *id.* at art. 20(1).

³³ See *id.* at art. 21.

is presumed under article 17.³⁴ Nevertheless, if the carrier fails to rebut the presumption, it will be held liable.

The strong presumption created by article 17 is tempered by the low liability limits established by article 22. Article 22 creates an upper limit on a passenger's recovery of 125,000 francs, or approximately \$8,300.00.³⁵ Article 25(1) establishes the only exception to this recovery ceiling, providing:

The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his *wilful misconduct* or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.³⁶

A. *Prerequisites and Particulars*

Articles 1 and 3 define the threshold requisites necessary for the Warsaw Convention to apply. Article 1(1) provides that the Convention applies only "to all international transportation of persons. . . ."³⁷ Article 1(2) defines transportation as international when:

[A]ccording to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties,³⁸ or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory

³⁴ See Abramovsky, *supra* note 1, at 350.

³⁵ See Warsaw Convention, *supra* note 4, at art. 22. The dollar equivalent of \$8300.00 has been used since the United States devaluation of the franc in 1933. See Lowenfeld & Mendelsohn, *supra* note 21, at 499 n.10.

³⁶ See Warsaw Convention, *supra* note 4, at art. 25 (emphasis added).

³⁷ *Id.* at art. 1(1).

³⁸ "High Contracting Parties" refers to those countries that participated in the drafting of the Convention and thereafter accepted the agreement as a signatory, by ratification or adherence. The initial parties to the Convention included the German Reich, Austria, Belgium, Brazil, Bulgaria, China, Denmark, Iceland, Egypt, Spain, Estonia, Finland, France, Great Britain, Ireland and the British Dominions, India, Greece, Hungary, Italy, Japan, Latvia, Luxembourg, Mexico, Norway, the Netherlands, Poland, Rumania, Sweden, Switzerland, Czechoslovakia, Russia, Venezuela, and Yugoslavia. 49 Stat. at 3014.

subject to the sovereignty, suzerainty, mandate, or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.³⁹

The contract between the parties is the passenger ticket,⁴⁰ which must be in writing and delivered to the passenger.⁴¹ For the Convention limits to apply, article 3 also requires that the ticket contain certain "particulars."⁴² The treaty provides:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

- (a) The place and date of issue;
- (b) The place of departure and of destination;
- (c) The agreed stopping places. . . ;
- (d) The name and address of the carrier or carriers;
- (e) A statement that the transportation is subject to the rules relating to liability established by this convention.⁴³

Failure by a carrier to deliver the ticket, or to list any of the particulars, especially a statement of the carrier's liability, would render the Convention—and the carrier's liability limitation—inapplicable to any subsequent accident.⁴⁴ Further, it is the ticket that establishes the international status of the flight,⁴⁵ by the required statement of "the place of departure and of destina-

³⁹ Warsaw Convention, *supra* note 4, at art. 1(2).

⁴⁰ The "contract" between the parties and regulated by the Convention is the ticket issued by the carrier and accepted by the passenger. See *In Re Air Crash in Bali, Indonesia*, 462 F. Supp. 1114, 1120-21 (C.D. Cal. 1978), *rev'd on other grounds*, 684 F.2d 1301 (9th Cir. 1982). See also Note, *supra* note 22, at 338 ("The passenger ticket . . . is the contract. . .").

⁴¹ Warsaw Convention, *supra* note 4, at art. 1(2).

⁴² See *id.* at art. 3(1).

⁴³ *Id.*

⁴⁴ See, e.g., *Ross v. Pan American Airways*, 85 N.E.2d 880, 885 (N.Y. 1949) ("[D]elivery of a ticket is thus a condition set up by the Convention itself, as a determinant of the applicability, or no, of the Convention's limited liability rules. . ."); Note, *supra* note 22, at 340 ("[T]he carrier must . . . deliver the ticket containing the essential particulars to avail itself of the limitation on liability. . .").

⁴⁵ See Warsaw Convention, *supra* note 4, at art. 1(2).

tion.”⁴⁶ Taken together, articles 1 and 3 achieve the primary purpose of the Convention.⁴⁷ The requirements permit “parties to clearly establish their rights and liabilities prior to the initial flight, and courts to apply the Convention in a simple and uniform manner.”⁴⁸

B. Revisions

Debate in the United States concerning the inadequacy of the Convention's limit on liability began soon after ratification in 1934 and has not subsided.⁴⁹ In September, 1955, the Hague Protocol was established to amend the Warsaw Convention.⁵⁰ The Protocol doubled the liability limitations to 250,000 francs, or approximately \$16,000.00,⁵¹ and made the passenger ticket *prima facie* evidence of the contract between the parties.⁵² The United States refused to ratify the protocol because it considered the liability limit too low.⁵³ In 1965, the United States gave

⁴⁶ See *id.* at art. 3(1)(b).

⁴⁷ See notes 23-27 *supra* and accompanying text. See also Note, *supra* note 22, at 341 (“[T]he interrelationship between article 1 and article 3 guarantees that the Convention's essential purpose will be achieved.”).

⁴⁸ Note, *supra* note 22, at 341.

⁴⁹ See *id.* at 342-43.

⁵⁰ Protocol Amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 (1963), U.S. Civil Aeronautics Board, Aeronautical Statutes and Related Material 473 (rev. ed. 1974) [hereinafter referred to and cited as Hague Protocol]. The Hague Protocol resulted from the long-standing debate over the inadequacies of the Warsaw Convention. A diplomatic conference was conducted at The Hague in September, 1955, “after ten years of discussions, meetings, and drafts.” See Lowenfeld & Mendelsohn, *supra* note 21, at 504. On September 28, 1955, the Protocol was opened for signature; it became effective on August 1, 1963. See *id.* at 541. The Protocol effectively amended the Warsaw Convention with respect to signatory countries. See Note, *supra* note 22, at 343.

⁵¹ Article XI amended article 22(1) of the Convention to provide that “the liability of the carrier for each such passenger is limited to the sum of two hundred and fifty thousand francs.” 478 U.N.T.S. at 381. Although the liability limitation amount is stated in francs, it was debated in terms of francs or dollars, and set at 250,000 francs, or \$16,600.00. See Lowenfeld & Mendelsohn, *supra* note 21, at 506-09. The limitation is absolute—there is no provision for inflation or currency fluctuations.

⁵² See Hague Protocol, *supra* note 50, art. III.

⁵³ See Abramovsky, *supra* note 1, at 351. See generally Lowenfeld & Mendelsohn, *supra* note 21, at 509-46 (“The opponents of the Convention attacked limitation of liability in general, arguing that international aviation had no claim for special protection.”).

notice of its denunciation of the Warsaw Convention because of the low recovery limit.⁵⁴ An interim private agreement among air carriers, commonly known as the Montreal Agreement,⁵⁵ was reached in 1966 one day before the effective date of the United States denunciation of the Warsaw Convention.⁵⁶

The Montreal Agreement is a special contract among signatory air carriers⁵⁷ that substantially improves the position of injured passengers. The signatories agreed to increase their liability to \$75,000.00 for injuries or deaths occurring on international flights⁵⁸ when the United States is a "point of origin, a point of destination, or a scheduled stopping point,"⁵⁹ to be determined from the passenger ticket.⁶⁰ Further, the signatories agreed to waive their defenses under articles 20 and 21 of the Convention,⁶¹ replacing the presumption of liability standard⁶² with *absolute liability* under the Agreement.⁶³

⁵⁴ See 53 Dept. State Bull. 924 (1965). Article 39(1) of the Convention permits "[a]ny one of the High Contracting Parties [to] denounce this convention," provided that notice is sent to the Polish government, which in turn notifies all of the other parties. Article 39(2) further provides that denunciation becomes effective six months after notification, and operates only with respect to the denouncing party. Warsaw Convention, *supra* note 4, at art. 39.

⁵⁵ Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, C.A.B. Agreement No. 18,900, *approved* C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966) [hereinafter referred to and cited as Montreal Agreement].

⁵⁶ See Note, *supra* note 22, at 345. For a thorough discussion of the circumstances leading up to and surrounding the Montreal Agreement, see Lowenfeld & Mendelsohn, *supra* note 21, at 546-602.

⁵⁷ "The Montreal Agreement is not an international treaty but is merely an agreement between air carriers approved by the United States Government. Such an agreement is sanctioned by article 22(1) of the Warsaw Convention." Abramovsky, *supra* note 1, at 351 n.67. Signatories to the Agreement include air carriers from all over the world. For a complete listing of the signatories, see U.S. Civil Aeronautics Board, *supra* note 50, at 515-16.

⁵⁸ See Montreal Agreement, *supra* note 55, at ¶ 1(1). The \$75,000.00 liability figure is stated in United States dollars. See *id.*

⁵⁹ *Id.* at ¶ 1.

⁶⁰ See *id.*; Note, *supra* note 22, at 345.

⁶¹ See notes 32-33 *supra* and accompanying text.

⁶² See notes 30-33 *supra* and accompanying text.

⁶³ The Agreement provides in pertinent part, "The carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol." Montreal Agreement, *supra* note 55, at ¶ 1(2). See also Abramovsky, *supra* note 1, at 351 ("[T]he Agreement replaced the presumption of liability standard with absolute liability.").

C. *Application of the Warsaw Convention*

The Montreal Agreement merely modified the recovery limitations of the Warsaw Convention among signatory air carriers; the Convention continues to apply in full force in all other respects.⁶⁴ As a treaty to which the United States has adhered, the Convention is the "supreme law of the land,"⁶⁵ and it provides an exclusive remedy for cases within its purview.⁶⁶ Article 1(1) provides that "[t]his convention *shall* apply to *all* international transportation of persons . . . performed by aircraft for hire."⁶⁷

Article 24 of the Convention further provides:

- (1) In the cases covered by articles 18 and 19 any action for damages, *however founded*, can only be brought subject to the conditions and limits set out in this convention.
- (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply. . . .⁶⁸

Article 24 has been interpreted as not limiting the kind of cause of action a passenger may bring—i.e., tort or breach of contract.⁶⁹ Rather, the phrase "however founded" has been construed to "accommodate all of the multifarious bases on which a claim might be founded in different countries, whether under code law or common law. . . ."⁷⁰ If the passenger's claim as stated comes within the terms of articles 17 or 18, however, it "can only be brought subject to the conditions and limitations established by the Warsaw system."⁷¹

⁶⁴ See Note, *supra* note 22, at 345-46 (Montreal Agreement "did not modify the original Convention").

⁶⁵ See *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238, 1243 (S.D.N.Y. 1975) [hereinafter referred to as *Husserl II*]. The Convention's status as a treaty has been debated by some commentators, but accepted by most. For a discussion of the debate, see Note, *supra* note 22, at 342 n.54.

⁶⁶ See text accompanying note 67 *infra*; 388 F. Supp. at 1243-45.

⁶⁷ Warsaw Convention, *supra* note 4, at art. 1(1) (emphasis added).

⁶⁸ *Id.* at art. 24 (emphasis added).

⁶⁹ See 388 F. Supp. at 1245-46.

⁷⁰ *Id.* at 1245.

⁷¹ *Id.*

III. THE WARSAW CONVENTION, HIJACKINGS, AND MENTAL ANGUISH

By its terms, the Warsaw Convention is relatively straightforward and unambiguous. It provides a uniform system of liability and recovery for international air carrier "accidents."⁷² Nevertheless, certain criminal developments since 1929 have rendered the Convention's terms ambiguous. Airline hijackings were "probably not within the specific contemplation of the parties at the time the Warsaw Convention was promulgated. . . ."⁷³ The Montreal Agreement indirectly established that hijackings are considered "accidents" under the Convention and thus subject to its limitations,⁷⁴ but it left unclear the precise nature of

⁷² See notes 23-36 *supra* and accompanying text. Article 17 provides for carrier liability for personal injuries arising from "accident[s]" on board or around the aircraft.

⁷³ *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973) [hereinafter referred to as *Husserl I*].

⁷⁴ The Agreement does not expressly refer to "accidents" or "hijackings;" rather, it modifies the liability language of the Convention to provide absolute carrier liability in the amount of \$75,000.00 "for each passenger for death, wounding, or other bodily injury." Montreal Agreement, *supra* note 55, at ¶ 1(1). The Agreement omits the Convention's reference contained in article 17 to "accident" as the causation of "death or wounding . . . or any other bodily injury." In *Husserl I*, the court stated that "the Montreal Agreement seems to resolve whatever doubt might have existed over the construction of the word 'accident.'" 351 F. Supp. at 706. The court reasoned:

It is significant that press releases of the State Department and the order of the Civil Aeronautics Board do not mention the word "accident" in the context of recovering for personal injury, but rather accept the proposition that the Montreal Agreement imposes a system of "absolute liability" upon the carrier.

Id. (citing C.A.B. Order No. E-23680, 31 Fed. Reg. 7302 (1966); Department of State Press Release Nos. 110, 111; 54 Dept. State Bull. 955, 956 (1966)).

Further, the Agreement itself expressly precludes its application to "any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury. . . ." Montreal Agreement, *supra* note 55, at ¶ 1(2). The purpose is to prevent "[t]hose guilty of sabotage and persons claiming on their behalf . . . [from] recover[ing] any damages." 54 Dept. State Bull. at 956. The *Husserl I* court drew the inference that "the innocent victims of wilful acts by others are to be able to recover . . . even in respect to acts of sabotage," and concluded that the "analogy between hijacking and sabotage is clear." 351 F. Supp. at 707.

Finally, Professor Lowenfeld, who represented the State Department at the Montreal meetings, has stated that "sabotage is quite clearly included in the area of recovery under [the] Montreal [Agreement] (except for someone claiming on behalf of the perpetrator himself)." Lowenfeld, *Hijacking, Warsaw, and the Problem of Psychic Trauma*,

a passenger's remedy.⁷⁵ Thus, death or physical injuries resulting from a hijacking are now covered by the Convention via the Agreement,⁷⁶ yet questions remain as to whether a passenger may recover damages when his only injury consists of mental distress.⁷⁷ The resolution of this issue is vitally important to most hijacking victims, whose sole injuries are mental anguish and distress.⁷⁸

To trigger application of the Convention and the Montreal Agreement, a passenger's injuries must fall within the terms of article 17.⁷⁹ Article 17 enumerates the injuries for which air carriers may be held liable.⁸⁰ The debate as to whether mental distress is included centers around the translation of article 17 from its original French text.⁸¹ The English translation of article 17 states in pertinent part: "The carrier shall be liable for damage sustained in the event of the *death or wounding* of a passenger *or any other bodily injury* suffered by a passenger. . . ."⁸² Mental distress is not the equivalent of "death or

1 SYR. 'J. INT'L L. & COM. 345, 346 (1973). This result is consistent with the purpose of the Montreal Agreement to impose absolute liability on air carriers for death, wounding or other bodily injury, irrespective of fault. *See id.*

⁷⁵ *See* *Husserl II*, 388 F. Supp. 1238, 1247 (S.D.N.Y. 1975). *See generally* Lowenfeld, *supra* note 74, at 345 (discussing whether psychological injuries are covered under the Warsaw Convention and Montreal Agreement).

⁷⁶ *See* note 74 *supra* and accompanying text. Article 17 of the Convention clearly provides recovery for *physical* injuries or death resulting from an accident on board or around the air craft.

⁷⁷ *See* *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Cal. 1975) (Montreal Agreement permits recovery for mental distress); 388 F. Supp. at 1242-45 (Warsaw Convention and Montreal Agreement permit recovery for mental injuries); *Rosman v. Trans World Airlines*, 314 N.E.2d 848, 857 (N.Y. 1974) (Warsaw Convention does not support claim that psychological trauma alone is compensable); *Burnett v. Trans World Airlines*, 368 F. Supp. 1152, 1158 (D.N.M. 1973) (Warsaw Convention does not provide recovery for mental anguish); *Abramovsky*, *supra* note 1, at 348 ("This issue is of extreme importance since most hijackings to date have not involved the actual infliction of physical injury upon passengers by the hijacker."); Lowenfeld, *supra* note 74.

⁷⁸ *See* *Abramovsky*, *supra* note 1, at 348.

⁷⁹ *See* Warsaw Convention, *supra* note 4, at art. 17; Montreal Agreement, *supra* note 55, at ¶ 1(2); 388 F. Supp. at 1245. This requirement is in addition to the two requisites discussed at notes 37-46 *supra* and accompanying text.

⁸⁰ *See* note 82 *infra* and accompanying text.

⁸¹ The Warsaw Convention was drafted and written in French in its entirety. *See* 314 N.E.2d at 851. It is reprinted in French at 49 Stat. 3000-09 (1934).

⁸² 49 Stat. 3018 (emphasis added).

wounding.”⁸³ The question, then, is whether mental distress may be considered as “any other bodily injury” under the terms of article 17. On this question, the courts have been divided.

A. Burnett v. Trans World Airlines

*Burnett v. Trans World Airlines*⁸⁴ was a suit filed by a husband and wife who were passengers on board a Trans World Airlines (TWA) flight scheduled to fly from Athens, Greece, to New York, New York. In the course of the flight, members of the Popular Front for the Liberation of Palestine (PLO) diverted the airplane and forced the pilot to land in the desert near Amman, Jordan.⁸⁵ The plaintiffs and other passengers were held captive for six days in the close confines of the airplane’s cabin. The plaintiffs were deprived of regular food and water and subjected to the temperature extremes of the desert. In addition, Mr. Burnett experienced swelling in his ankles, and the couple feared that their lives were in jeopardy. As a result, the Burnetts claimed to have suffered severe emotional trauma.⁸⁶

The Burnetts sued TWA under the Warsaw Convention for their mental distress and its physical manifestations.⁸⁷ Both parties stipulated that the Convention and the Montreal Agreement applied to the suit, and if article 17 covered the injuries, then TWA was absolutely liable up to \$75,000.00.⁸⁸

The plaintiffs argued that mental anguish alone is compensable under article 17’s provision for “bodily injury,” and that the tort law of New Mexico applied to determine the scope of the term.⁸⁹ The court rejected the plaintiffs’ argument regarding the substantive law to be applied, stating that “the meaning of the Warsaw Convention is a matter of federal law. It is a sovereign treaty and as such is the supreme law of the land,

⁸³ See 388 F. Supp. at 1250.

⁸⁴ 368 F. Supp. 1152 (D.N.M. 1973).

⁸⁵ *Id.* at 1153.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1153-54.

⁸⁹ *Id.* at 1155. The plaintiffs argued that because jurisdiction in the federal court was based upon diversity of citizenship, state substantive law applied to interpret the Convention’s terms.

preempting local law in the areas where it applies.”⁹⁰ The court determined that because the Convention was drafted in French, the French legal meaning of “bodily injury” applied, and that French law distinguished between “lesion corporelle” (bodily injury) and “lesion mentale” (mental injury).⁹¹ The court held that mental anguish alone is not a compensable bodily injury under the Warsaw Convention,⁹² citing *Husserl v. Swiss Air Transport Co.*⁹³ (*Husserl I*) as support. “[T]he court in *Husserl I* . . . proceeding on a similar analysis, reached an identical conclusion in observing that mental anguish alone does not fall within the purview of Article 17.”⁹⁴ However, the conclusion cited by the *Burnett* court was dictum in *Husserl I*, and was expressly overruled by the same federal district court in *Husserl v. Swiss Air Transport Co.* (*Husserl II*).⁹⁵

The *Burnett* court concluded by reviewing the legislative history of the 1929 Warsaw Convention and the intent of its draftsmen.⁹⁶ The court found its conclusion—that mental anguish is not covered by the Convention—consistent with the intent of the draftsmen, stating:

By thus restricting recovery to bodily injuries, the inference is strong that the Convention intended to narrow the otherwise broad scope of liability under the former draft and preclude recovery for mental anguish alone. Had the delegates desired otherwise, there would have been no reason to so substantially modify the proposed draft of the First Conference.⁹⁷

Nevertheless, the inference drawn by the *Burnett* court is not as strong as it suggests, considering that causes of action for mental

⁹⁰ *Id.* (citations omitted). *Contra* Lowenfeld, *supra* note 74, at 349-50.

⁹¹ 368 F. Supp. at 1156.

⁹² *Id.* at 1158.

⁹³ 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

⁹⁴ 368 F. Supp. at 1156 (quoting 351 F. Supp. at 708).

⁹⁵ 388 F. Supp. 1238, 1250-51 (S.D.N.Y. 1975).

⁹⁶ 368 F. Supp. at 1156-57.

⁹⁷ *Id.* at 1157. The predecessor of the Warsaw Convention, the First International Conference on Private Air Law, proposed a liability section that provided that “[t]he carrier is liable for accidents, losses, damage to goods and delays.” *Id.* The broad scope of this provision was substantially narrowed by the Second International Conference’s restriction of carrier liability for death, wounding or other bodily injury. *See* Warsaw Convention, *supra* note 4, at art. 17.

anguish alone were not as generally recognized in 1929 as they are today.⁹⁸

B. Rosman v. Trans World Airlines

The plaintiffs in *Rosman v. Trans World Airlines*⁹⁹ were among the passengers on board the same hijacked TWA flight at issue in *Burnett*.¹⁰⁰ Mrs. Rosman claimed that she had suffered a backache, swollen feet, and discoloration of her legs and back resulting from forced immobility.¹⁰¹ Her two children claimed to have developed skin irritations and boils from lack of sanitary facilities.¹⁰² The Rosmans and a fourth plaintiff, Miriam Herman, whose actions were consolidated for appeal,¹⁰³ all claimed dehydration and weight loss resulting from inadequate food and water.¹⁰⁴ Finally, all plaintiffs claimed "severe psychic trauma."¹⁰⁵ The court found such trauma natural, stating that "[w]hile none of them alleged to have been shot, struck or personally assaulted by any of the hijackers, the plaintiffs, all Jewish, naturally feared that their lives were in grave danger."¹⁰⁶

The court recognized that TWA would be absolutely liable under article 17 of the Warsaw Convention for "death or wounding . . . or any other bodily injury" suffered by the plaintiffs.¹⁰⁷ It then proceeded to determine whether mental distress is encompassed by the term "bodily injury." The court found that as a treaty, the Warsaw Convention is the "supreme law of the land,"¹⁰⁸ and that although the treaty is written in French and

⁹⁸ *Rosman v. Trans World Airlines*, 314 N.E.2d 848, 859 (N.Y. 1974) (Stevens, J., dissenting) ("Certainly, psychic trauma was not an area generally embraced within the term 'bodily injury' at the time or times of the drafting and writing of the Convention. In fact in even so progressive a State as New York, it is not too long ago that . . . one was permitted to maintain an action to recover for emotional and neurological disturbances negligently caused.") (citations omitted).

⁹⁹ *Id.* at 848.

¹⁰⁰ See notes 84-86 *supra* and accompanying text.

¹⁰¹ 314 N.E.2d at 850.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 849 (citing the Warsaw Convention, *supra* note 4, at art. 17).

¹⁰⁸ *Id.* at 852 (citing U.S. CONST. art. VI, cl. 2).

its meaning is the French legal meaning,¹⁰⁹ its interpretation is not governed by French law.¹¹⁰ Further, the court found no "useful purpose" in conducting a hearing to determine if the Convention's draftsmen intended to include mental distress under article 17.¹¹¹ The court noted:

Our study of the minutes of the Convention indicates that the drafters did not define or discuss what was meant by the phrase "death or wounding . . . or any other bodily injury" in Article 17. . . . In addition, the question of whether psychic injury is a "bodily injury" "was never talked about at Montreal."¹¹²

The court concluded that the treaty should be interpreted according to its purposes and the ordinary meaning of its terms.¹¹³

The *Rosman* court held that the plaintiffs could prove at trial¹¹⁴ and recover for "*palpable, objective bodily injuries* suffered, whether caused by psychic trauma or by physical conditions on the aircraft, irrespective of impact."¹¹⁵ But the plaintiffs could not prove or recover "for psychic trauma alone."¹¹⁶ The court held that psychic trauma alone is not covered under article 17's provision for "bodily injury," reasoning:

The inclusion of the term "bodily" to modify "injury" cannot be ignored, and in its ordinary usage, the term "bodily" suggests opposition to "mental." . . . In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in Article 17 connotes palpable, conspicuous physical injury, and

¹⁰⁹ *Id.* at 853 (citing *Block v. Compagnie Nationale Air France*, 386 F.2d 323, 330 (5th Cir.), *cert. denied*, 392 U.S. 905 (1967)).

¹¹⁰ 314 N.E.2d at 853-54.

¹¹¹ *Id.* at 854.

¹¹² *Id.* at 854 (quoting Lowenfeld, *supra* note 74, at 347-48). The court stated that "[t]he minutes of the Convention indicate that the debate over this article centered around the issue of when the air carrier's liability for damage to passengers should begin and end rather than the scope of compensable injuries." *Id.* at 854 n.10. Compare the *Rosman* court's finding with the *Burnett* court's willingness to infer an intent by the Warsaw Convention draftsmen to exclude mental anguish from article 17's purview. See notes 96-97 *supra* and accompanying text.

¹¹³ 314 N.E.2d at 854.

¹¹⁴ The *Rosman* case was before the New York Court of Appeals on the defendant's appeal of summary judgments granted to the plaintiffs by the trial court. *Id.* at 848.

¹¹⁵ *Id.* at 850 (emphasis added).

¹¹⁶ *Id.*

excludes mental injury with no observable "bodily," as distinguished from "behavioural," manifestations.¹¹⁷

The court cited *Husserl I*¹¹⁸ and *Burnett*¹¹⁹ in support of its holding.¹²⁰

C. Husserl v. Swiss Air Transport Co.

In *Husserl v. Swiss Air Transport Co.* (*Husserl II*),¹²¹ Mrs. Husserl was a passenger on board a Swiss Air flight scheduled to fly from Zurich, Switzerland, to New York, New York, on September 6, 1970.¹²² En route, a group of Arabian terrorists hijacked the airplane and forced the pilot to fly to the desert near Amman, Jordan. Mrs. Husserl and the other passengers were forcibly held on the airplane for "24 hours under circumstances less than ideal for physical or mental health."¹²³ The women and children passengers were thereafter moved to a hotel in Amman where they stayed until September 11. Mrs. Husserl finally arrived in New York on September 13.¹²⁴

As a result of the hijacking, Mrs. Husserl claimed that she had suffered "bodily injury and severe mental pain and anguish resulting from her expectations of severe injury and/or death."¹²⁵ She did not claim, however, to have been physically injured.¹²⁶

The case first appeared in *Husserl I*,¹²⁷ before a New York federal district court, on the defendant's motion for summary judgment or, in the alternative, dismissal of the complaint.¹²⁸ The defendant's motion alleged that any claim asserted by the plaintiff was governed exclusively by the Warsaw Convention; that the Convention provides liability only for injuries caused

¹¹⁷ *Id.* at 855 (footnote omitted).

¹¹⁸ 351 F. Supp. 702.

¹¹⁹ 368 F. Supp. 1152.

¹²⁰ See 314 N.E.2d at 857.

¹²¹ 388 F. Supp. 1238 (S.D.N.Y. 1975).

¹²² *Id.* at 1242.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

¹²⁸ 351 F. Supp. at 704.

by an accident; that a hijacking is not an accident; and that, therefore, no liability attached to it under the factual circumstances.¹²⁹ The court rejected the defendant's arguments, and denied its motion for summary judgment or dismissal.¹³⁰ In dictum, the court opined that mental injuries alone would not be compensable as a "bodily injury" under article 17 of the Convention.¹³¹

After an unsuccessful appeal of the *Husserl I* holding,¹³² the defendant followed the court's lead and filed a second motion for summary judgment based on the court's dictum in *Husserl I*.¹³³ The defendant's motion again alleged that any claim asserted by the plaintiff was governed exclusively by the Warsaw Convention; that the Convention does not provide recovery for mental anguish alone under article 17; and that the only injuries alleged by the plaintiff resulted solely from mental anguish.¹³⁴ Resolution of the defendant's allegations produced the *Husserl II*¹³⁵ opinion, decided by the same New York federal district court that had rendered the decision in *Husserl I* approximately three years earlier.

In resolving the issue, like the *Burnett*¹³⁶ and *Rosman*¹³⁷ courts before it, the *Husserl II* court undertook to determine for itself whether mental injuries are compensable under article 17's provision for "any other bodily injury."¹³⁸ The court first opined that the French legal meaning and interpretation of the treaty and its terms are not binding.¹³⁹ Rather, it found that the Convention has become a part of the federal law of the United States, and should be interpreted thereunder. The court then attempted to ascertain the intent of the draftsmen and signatories concerning inclusion of mental anguish under article 17. The

¹²⁹ *Id.*

¹³⁰ *Id.* at 706-07.

¹³¹ *Id.* at 707-08.

¹³² 485 F.2d 1240 (per curiam opinion affirming the district court's decision below).

¹³³ 388 F. Supp. at 1242.

¹³⁴ *Id.*

¹³⁵ *Husserl v. Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975).

¹³⁶ See notes 89-97 *supra* and accompanying text.

¹³⁷ See notes 107-120 *supra* and accompanying text.

¹³⁸ The Warsaw Convention, *supra* note 4, at art. 17.

¹³⁹ 388 F. Supp. at 1249.

court reasoned that "the Parties probably had no specific intention at all about mental and psychosomatic injuries because, if they had, they would have clearly expressed their intentions."¹⁴⁰

The court did find, however, that the draftsmen had the intent to "effect the purpose" of the treaty and that they "apparently took some pains to make it comprehensive."¹⁴¹ Moreover, the court found no evidence that the draftsmen "intended to preclude recovery for any particular type of injury."¹⁴² The court held that the treaty should be construed broadly to cover many types of injuries, stating:

To regulate in a uniform manner the liability of the carrier, [the draftsmen] must have intended to be comprehensive. To effect the treaty's avowed purpose, the types of injuries enumerated should be construed expansively to encompass as many types of injury as are colorably within the ambit of the enumerated types.¹⁴³

The court found mental and psychosomatic injuries to be "colorably within that ambit," noting the "vast strides . . . taken relatively recently in . . . physiology and psychology," making it "increasingly evident that the mind is part of the body."¹⁴⁴ The court held accordingly that mental anguish alone is "comprehended by Article 17."¹⁴⁵

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1250.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* The court also noted that "personal injury" was substituted for "bodily injury" by article 17 of the Guatemala Protocol, a "treaty drafted to supplant the Warsaw system," suggesting that the substitution could have been intended to be used as a "shorthand for the phrase at issue, or as a clarification of it, or as a means of expanding its comprehension." *Id.* at 1249-50. The Guatemala Protocol resulted from a diplomatic conference in Guatemala conducted in 1971 by the International Civil Aviation Organization to amend the Warsaw Convention. Fifty-five countries participated in producing the Protocol, which calls for absolute liability in article 4, and an increase in the liability ceiling to 1,500,000 francs, or \$100,000.00 per passenger in article 8. Further, article 10 requires the parties to meet every fifth year to review the liability limit, which would be increased by \$12,500.00 unless otherwise agreed. *See* Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, March 8, 1971, Guatemala City, Guatemala, ICAO Doc. 8932; Abramovsky, *supra* note 1, at 356-59. The United States has never ratified the Protocol, 1 S. SPEISER & C. KRAUSE, AVIATION TORT LAW § 11:20 (1978), which is now known as the Montreal Protocol because of subsequent conferences in Montreal. *Id.* (Supp. 1985).

In reaching its holding, the court recognized that other courts had reached different conclusions in similar cases decided after its *Husserl I* opinion,¹⁴⁶ and apologized for any reliance placed by those courts on its dictum in *Husserl I*.¹⁴⁷ Writing for the majority, Judge Tyler stated:

In reaching this determination, I am not unmindful of other courts which have reached different conclusions when deciding similar cases involving mental injuries caused by hijackings. Each court decided its cases after the earlier *Husserl* opinion, in which this court raised questions about the meaning of the phrase at issue and suggested tentative conclusions. To the extent those courts' citations of that opinion indicated some small reliance on this court's dictum concerning the phrase at issue, I proffer my apologies but now conclude that the issue must be decided as has been indicated.¹⁴⁸

Judge Tyler then briefly discussed the contrary holdings of *Burnett*, *Rosman* and *Herman*,¹⁴⁹ concluding:

With these scholarly and well-considered opinions, I respectfully disagree only to the extent that I believe mental injury alone should be compensable, *if the otherwise applicable substantive law provides an appropriate cause of action*. To hold otherwise, in my view, would not only create confusing problems of proof but also limit the effectiveness of the Warsaw system in achieving its purpose.¹⁵⁰

While the court held that mental injuries alone are comprehended by article 17, recovery would not be available in every case. Rather, recovery was limited by the court to cases in which the "applicable substantive law" provides a cause of action for mental injuries alone.¹⁵¹ The court held in dictum that the "applicable substantive law" should be chosen by conflicts of law

¹⁴⁶ The court specifically cited *Burnett v. Trans World Airlines*, and the companion cases of *Herman v. Trans World Airlines* and *Rosman v. Trans World Airlines*, as having reached opposite conclusions with citations to *Husserl I* for support. See 388 F. Supp. at 1251.

¹⁴⁷ See *id.* at 1250-51.

¹⁴⁸ *Id.*

¹⁴⁹ See notes 84-120 *supra* and accompanying text.

¹⁵⁰ 388 F. Supp. at 1251 (emphasis added).

¹⁵¹ See text accompanying note 150 *supra*.

principles.¹⁵² New York's conflicts of law rules were held to apply,¹⁵³ under which New York's substantive law was held to govern.¹⁵⁴ The court noted that the substantive law of New York provides a cause of action for mental and psychosomatic injuries alone.¹⁵⁵

D. Krystal v. British Overseas Airways Corp.

In *Krystal v. British Overseas Airways Corp.*,¹⁵⁶ a federal district court in California followed *Husserl II* and held that mental injuries are compensable under the Warsaw Convention.¹⁵⁷ Mr. and Mrs. Krystal were passengers on a British Overseas Airways Corporation (BOAC) flight scheduled to fly from Bombay, India, to London, England.¹⁵⁸ The airplane was diverted by hijackers to Amsterdam, Holland.¹⁵⁹ The Krystals sued BOAC, claiming damages for mental distress resulting from fright, anxiety, stress, fear and loss of sleep.¹⁶⁰ BOAC moved for summary judgment, alleging that such damages are not compensable under article 17 of the Warsaw Convention.¹⁶¹ The court denied the motion, holding that mental injuries are compensable under article 17 *as a matter of law*.¹⁶²

In reaching its decision, the court noted that "[t]his Court is, of course, aware that other courts have reached contrary conclusions."¹⁶³ The court further opined that "such interpretations of Art. 17 are untenable. It cannot be said, with finality, that the drafters of the Warsaw Convention intended to preclude

¹⁵² 388 F. Supp. at 1252. The court admitted that it was "unable to locate any authority directly on point." *Id.*

¹⁵³ *Husserl* was a diversity case in a federal court in New York. *See id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (citing *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961) (allowing recovery for mental injuries incurred by negligently induced fright)).

¹⁵⁶ 403 F. Supp. 1322 (C.D. Cal. 1975).

¹⁵⁷ *Id.* at 1324.

¹⁵⁸ *Id.* at 1322.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1322-23.

¹⁶¹ *Id.*

¹⁶² *Id.* at 1324.

¹⁶³ *Id.* at 1323.

recovery for mental distress.”¹⁶⁴ The court cited *Husserl II* as support.¹⁶⁵

E. Are Mental Injuries Compensable Under the Warsaw Convention?

It is obvious from the foregoing discussion that there is no uniform answer as to whether damages for mental anguish are compensable under the Warsaw Convention. A New Mexico federal district court in *Burnett* and the highest state court of New York in *Rosman* decided that such damages are not compensable under the Warsaw Convention.¹⁶⁶ A New York federal district court in *Husserl II* and a California federal district court in *Krystal* held to the contrary.¹⁶⁷ The *Burnett* and *Rosman* opinions, however, may be challenged to the extent that they relied upon dictum in *Husserl I*, which was later overruled in *Husserl II*.¹⁶⁸

Compensable injuries under the Warsaw Convention may be a question for local law.¹⁶⁹ In examining the issue, Professor Lowenfeld¹⁷⁰ stated:

The question then comes up, what do you mean by “bodily injury”? Is a psychic injury a “bodily injury”? The fact is this was never talked about at Montreal. To the extent that

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at 1323-24. The *Krystal* court cited the Montreal Agreement, *supra* note 55, as additional support for its holding. The court stated:

This Court is of the opinion that the effect of the Montreal Agreement is to permit recovery for mental distress. Under the Agreement, the signatory airlines agreed, *inter alia*, that they would print on their tickets a notification to the passenger of the possible applicability of the Warsaw Convention. . . . [T]he actual Notice to which the airlines agreed changed the relevant wording to . . . “personal injury”

It appears that such notice is determinative of the issue. The fact that “wounding . . . or bodily injury” is replaced by “personal injury” . . . suggests an intention to clarify the type of injury which is compensable.

403 F. Supp. at 1323. *Contra* Lowenfeld, *supra* note 75, at 347 n.7.

¹⁶⁶ See notes 84-120 *supra* and accompanying text.

¹⁶⁷ See notes 121-165 *supra* and accompanying text.

¹⁶⁸ See notes 146-150 *supra* and accompanying text.

¹⁶⁹ See Lowenfeld, *supra* note 67a, at 349-50.

¹⁷⁰ Professor of Law, New York University School of Law. Professor Lowenfeld represented the United States Department of State at the negotiations in Montreal that resulted in the Montreal Agreement. See notes 51-65 *supra* and accompanying text.

there was any thought about it, the assumption was that the meaning goes back to what was intended in the Warsaw Convention itself. I have looked back at the words of the Warsaw Convention, and there isn't anything there either. No one, either in the Warsaw meetings in 1929 or in the preparatory meetings in the period 1925-29, made any effort to distinguish or define what was meant by "injury."¹⁷¹

Unable to obtain any guidance from the history of the Convention or the intent of its draftsmen, Professor Lowenfeld rejected any contention that French law be consulted, and found the New York court's suggestion to that effect "misguided."¹⁷² He concluded that "this is one of those subjects that the Warsaw Convention, including now the Montreal Agreement, leaves to local decision."¹⁷³ Professor Lowenfeld supported his theory by citing provisions of the Convention that leave other questions to local law.¹⁷⁴

Professor Lowenfeld further suggested that state law is the applicable law in a diversity case in federal district court.¹⁷⁵ His suggestions and opinions were expressly rejected by the *Rosman* court¹⁷⁶ and accepted and applied by the *Husserl II* court.¹⁷⁷

¹⁷¹ Lowenfeld, *supra* note 74, at 347.

¹⁷² *Id.* at 348. Professor Lowenfeld was referring specifically to the Kings County Supreme Court's construction of the language of article 17 according to the French legal meaning of its terms. *See Herman v. Trans World Airlines*, 330 N.Y.S.2d 829, 832 (N.Y. Sup. Ct. 1972). The appellate division apparently agreed with the lower court's approach to the convention, though it reversed the supreme court decision on the grounds that the French legal meaning of the words translated as "personal injuries" was a triable issue of fact. *See Herman v. Trans World Airlines*, 337 N.Y.S. 827, 828 (N.Y. App. Div. 1972).

Although Professor Lowenfeld's article was written and published prior to the New York Court of Appeals' review of the *Herman* case, his comments concerning the lower courts' adoption of the French legal meaning of the terms in article 17 apply with equal force to the higher court's decision, which adopted the lower courts' method of construction. *See Rosman v. Trans World Airlines*, 314 N.E.2d at 851-54. *See* note 109 *supra* and accompanying text.

¹⁷³ Lowenfeld, *supra* note 74, at 349.

¹⁷⁴ *See id.* Specifically, questions of contributory negligence (article 21), procedure (article 28(2)), and the method for calculating the two-year statute of limitations (article 29(2)) are left to the law of the forum.

¹⁷⁵ *Id.* at 350. Professor Lowenfeld rejected the idea that courts should apply federal law simply because the issue is a matter of treaty interpretation. *See id.*

¹⁷⁶ *See* 314 N.E.2d at 856. The court stated, "The application of local law would impress an artificial sense upon the terms which finds no warrant in the treaty and such a course would surely be a deviation from the principles of treaty construction." *Id.*

¹⁷⁷ *See* 388 F. Supp. at 1252.

CONCLUSION

The Warsaw Convention was created to eliminate legal uncertainty in an emerging international airline industry by promulgating uniform rules of law for carrier liability.¹⁷⁸ Even under the Convention, however, carrier liability for mental injuries resulting from hijackings is anything but certain or uniform. Some courts¹⁷⁹ have held that mental anguish is comprehended by article 17's provision for "death or wounding . . . or any other bodily injury;"¹⁸⁰ other courts¹⁸¹ have reached the opposite conclusion. What does seem certain is that the Convention's draftsmen probably never considered the issue.¹⁸²

The majority of airline hijacking victims are not physically injured;¹⁸³ rather, their only injuries consist of mental distress resulting from fear and anxiety.¹⁸⁴ For victims and their attorneys, the lesson to be learned from the foregoing discussion is clear—choose your forum carefully. The only certainty at the moment is that the federal district courts in New York and California have entertained causes of action for mental injuries under the Warsaw Convention. In other jurisdictions, your only solace may be that you were lucky enough to escape with your physical health and your life.

Karen M. Campbell

¹⁷⁸ See notes 21-36 *supra* and accompanying text.

¹⁷⁹ See notes 121-65 *supra* and accompanying text.

¹⁸⁰ Warsaw Convention, *supra* note 4, at art. 17.

¹⁸¹ See notes 84-120 *supra* and accompanying text.

¹⁸² See note 171 *supra* and accompanying text.

¹⁸³ See Abramovsky, *supra* note 1, at 348.

¹⁸⁴ *Id.*